

**UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION**

**UNITED STATES OF AMERICA**

**v.**

**Case No. 8:03-CR-77-T-30TBM**

**HATEM NAJI FARIZ**

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**RESPONSE TO THE GOVERNMENT’S MOTION IN LIMINE  
REQUESTING THE COURT TO TAKE JUDICIAL NOTICE OF THE  
TERRORIST DESIGNATION OF ELEHSSAN**

Defendant, Hatem Naji Fariz, by and through undersigned counsel, respectfully submits this response to the government’s motion in limine requesting the Court to take judicial notice of the designation of Elehssan by the U.S. Department of the Treasury, pursuant to Executive Order 13224. (Doc. 1218). Mr. Fariz states:

**I. Introduction**

The government has asked that this Court take judicial notice of the Treasury Department’s designation of Elehssan pursuant to its authority arising under President George W. Bush’s Executive Order 13224. The Treasury Department did not designate Elehssan until May 4, 2005, or just before jury selection began in this case.

To avoid several constitutional and other legal concerns, addressed further herein, this Court should either (1) decline to take judicial notice of this designation, or, alternatively, (2) give a limiting instruction, informing the jury that they cannot find Mr. Fariz guilty of any charges based on the designation of Elehssan, that it was not illegal to provide money or

other items to Elehssan until at least May 4, 2005, and “that [the jury] may, but is not required to, accept as conclusive any fact judicially noticed.” Fed. R. Evid. 201(g).

## **II. The Designation of Elehssan May Not Form the Basis of Liability for the Charges in this Case**

### **A. The Material Support Counts Rely on the Designation of Foreign Terrorist Organizations (“FTO”) by the Secretary of State**

On May 4, 2005, the Treasury Department’s Office of Foreign Assets Control designated Elehssan as a Specially Designated Global Terrorist (“SDGT”). Such a designation, however, is not relevant to the charges in the indictment based on 18 U.S.C. § 2339B – specifically Counts 3, 22-43 – since those charges rely on the designation, by the Secretary of State, with the consultation of the Secretary of the Treasury and the Attorney General, of a group as a foreign terrorist organization (“FTO”) pursuant to 8 U.S.C. § 1189.

While the government claims that “counsel for defendant Fariz asserted in his opening statement that Elehssan was not designated as a Specially Designated Terrorist until May 2005[, and then implied] that [the] United States lacked evidence to prove Counts Three, Twenty-Two through Thirty-Two and Thirty-Three through Forty-Three,” (Doc. 1218 at 7), counsel for Mr. Fariz’s statement did not so imply. Instead, Mr. Fariz’s argument was, simply, that the government did not designate Elehssan until May 2005. (Doc. 1201, Tr. 6/7/05, at 72). In any event, the government’s surmising of counsel for Mr. Fariz’s statement is incorrect, since the designation of Elehssan as a SDGT is not a predicate to the material-support related charges.

**B. Count Four Relies on the Designation of PIJ as a Specially Designated Terrorist Pursuant to Executive Order 12947**

The Treasury Department's designation of Elehssan is based on its claimed authority pursuant to Executive Order 13224, issued on September 23, 2001, by President George W. Bush. Count Four of the Superseding Indictment, returned in September 2004, alleges a conspiracy to violate Executive Order 12947, issued by President William J. Clinton on January 23, 1995, by making or receiving contributions of funds, goods, and services to the PIJ as a Specially Designated Terrorist ("SDT"). The government therefore cannot seek to base any liability on the designation of Elehssan pursuant to Executive Order 13224. Such an attempt would, *inter alia*, amount to a constructive amendment of the indictment and violate Mr. Fariz's Fifth Amendment rights. *See, e.g., Stirone v. United States*, 361 U.S. 212 (1960); *United States v. Cancelliere*, 69 F.3d 1116, 1121 (11th Cir. 1995).

**C. The Court Should Therefore Not Take Judicial Notice of the Designation**

In this respect, the Court should decline to take judicial notice of the designation, since it is irrelevant, Fed. R. Evid. 401 and 402, and would mislead or confuse the jury, Fed. R. Evid. 403. *See United States v. Falcon*, 957 F. Supp. 1572, 1585 (S.D. Fla. 1997) ("[A] court may refuse to take judicial notice of facts that are irrelevant to the proceeding or (in certain contexts) otherwise excludable under the Federal Rules.") (citations omitted).

**III. Because Defense Counsel Has Already Informed the Jury that Elehssan was Designated in May 2005, It is Not Necessary for this Court to Take Judicial Notice of the Designation**

The only relevance of the designation of Elehssan is that Elehssan was not designated until May 4, 2005, meaning that it did not specifically appear on the government's list of prohibited organizations until that date and it was therefore not prohibited to provide funds to that group until at least May 4, 2005. Counsel for Mr. Fariz has already explained to the jury that Elehssan was not designated until a month before trial.

The government's intended use of the Elehssan designation actually demonstrates why the Court should reject its request to take judicial notice of the designation. The government claims that in 2002, Mr. Fariz engaged in a telephone conversation in which he and Salah Abu Hassanein "fashion a new alias for Elehssan" (Doc. 1218 at 6), and therefore "the *eventual* designation of Elehssan corroborates other proof that establishes a basis for defendant Fariz's heightened concern about secrecy and observing operational security sending funds to Elehssan." (Doc. 1218 at 7) (emphasis added). That argument is based on an unreasoned assumption that Mr. Fariz could predict that the government would, some three years later, designate Elehssan as a terrorist group and that, in 2002, he would therefore have security concerns. Even assuming that the government's interpretation of this conversation were correct, if Mr. Fariz were mistaken about whether Elehssan was designated, it would have no consequence. Elehssan simply was not designated until May 2005. Mr. Fariz's mistaken belief (if he had one) that Elehssan was designated cannot form

the basis of liability, since the charges in this case rely on an *actual* designation of a group or individual by the U.S. government.<sup>1</sup>

#### **IV. Constitutional Concerns for Taking Judicial Notice of the Designation of Elehssan**

##### **A. *Ex Post Facto* and Due Process Concerns**

The Treasury Department did not designate Elehssan until May 4, 2005.<sup>2</sup> Therefore, the designation cannot form the basis of liability until at least that date. The Court should either decline to take judicial notice of the designation, or specifically instruct the jury that: (1) they cannot find Mr. Fariz guilty based on the government's designation of Elehssan and (2) it was not illegal to provide funds to Elehssan until May 4, 2005.

##### **B. Due Process, Bill of Attainder, Separation of Powers, Delegation, and Confrontation Clause Concerns**

Mr. Fariz would additionally object to the Court taking judicial notice of the Elehssan designation on the grounds asserted in his response to the government's previous motion in limine asking the Court to take judicial notice of certain designations (Doc. 1036), incorporated fully herein by reference.

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<sup>1</sup> For example, suppose Person A says to Person B, who possesses the drug acetaminophen, that Person B should change the name of the drug to acetaminopha because the drug acetaminophen is on the controlled substances list. Acetaminophen is actually not on the controlled substances list; in fact, many take it under the brand name Tylenol. Person A's concerns are misplaced and there is nothing illegal about taking acetaminophen.

<sup>2</sup> This designation apparently has not been published in the Federal Register, nor has the government provided such a citation.

**C. Sixth Amendment Right to a Jury**

The government's attempt to use the designation of Elehssan, where it cannot form the basis of culpability in this case, could also be perceived as an attempt to inject Executive Branch "fact-finding" into this case, interfering with Mr. Fariz's right to have the facts in this case found by a jury beyond a reasonable doubt. Additionally, the government should not be able to argue that it has facts, beyond what it presents to the jury, that Elehssan is a terrorist group, or acts on behalf of a terrorist group. The Court should therefore reject the government's request to take judicial notice of the designation to ensure Mr. Fariz's Sixth Amendment rights.

## **V. Conclusion**

For the foregoing reasons, this Court should decline to take judicial notice of the designation of Elehssan as a SDGT. Alternatively, the Court should give a limiting instruction, informing the jury: (1) that they cannot find Mr. Fariz guilty of any charges based on the designation of Elehssan, (2) that it was not illegal to provide money or other items to Elehssan until at least May 4, 2005, and (3) “that it may, but is not required to, accept as conclusive any fact judicially noticed.” Fed. R. Evid. 201(g).

Respectfully submitted,

R. FLETCHER PEACOCK  
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 20th day of June, 2005, a true and correct copy of the foregoing has been furnished by CM/ECF, to Walter Furr, Assistant United States Attorney; Terry Zitek, Assistant United States Attorney; Cherie L. Krigsman, Trial Attorney, U.S. Department of Justice; Alexis L. Collins, Trial Attorney, U.S. Department of Justice; William Moffitt and Linda Moreno, counsel for Sami Amin Al-Arian; Bruce Howie, counsel for Ghassan Ballut; and to Stephen N. Bernstein, counsel for Sameeh Hammoudeh.

/s/ M. Allison Guagliardo  
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Assistant Federal Public Defender